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In the Supreme Court of the United States

OCTOBER TERM, 1955

HAROLD I. GAMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted pursuant to the request of the Court made in the course of oral argument on January 24, 1956.

1. The United States Attorney for the District of Columbia has provided us with the following information:

"a. In the District of Columbia no investigation of any kind is made by the United States Attorney or by members of his staff, or at his or their request, regarding persons named to serve as grand jurors. This has always been the policy in this district as far as he or members of his staff have any knowledge.

"In the event that reports are received, after either a grand or petit jury has been impaneled,

which indicate the possibility of jury tampering, such a matter will immediately be called to the court's attention and, if necessary and advisable, referred to the F. B. I. for investigation. Cf. *Remmer* v. *United States*, 347 U. S. 227.

b. The grand jury selection process in the District of Columbia is administered by the jury commissioner. It has been his practice to take names at random from the city directory, the telephone book, and other comparable publications. He then mails questionnaires to all individuals selected. These questionnaires seek information as to the age, residence, and employment of the individual in question. They also seek information as to matters which might affect statutory qualifications as a juror, including possible convictions of any offense involving moral turpitude.

The jury commissioner reviews the answers to these questionnaires and determines from the answers whether the individual is apparently qualified for jury service. The names of such individuals are then placed in a large receptacle, from which drawings are made in the presence of witnesses by the jury commissioner or his representative. Those whose names are thus drawn are then sent to the judge whose duty it is to make the final selection of the grand jury panel, and the Clerk of the District Court forwards each jury list to the Police Department for

a check as to whether any juror has a police record.

The Clerk of the District Court maintains cards on each grand juror actually selected. These cards set forth the juror's name, address, age, and employment. These cards are equally available to defense counsel and to the United States Attorney and his staff. The jury commissioner treats as confidential the returned questionnaires, which are not available either to defense counsel or to the government.

c. For a number of years it has been the practice of the Assistant United States Attorney in charge of grand jury matters in the District of Columbia to discuss the duties and responsibilities of grand jurors with each grand jury which has just been sworn in. In basic fairness both to the members of the grand jury and to the individuals whose cases may be presented, he tells the jurymen as part of this discussion that if any case is presented to them in which any of them know the prospective defendant or anything about him, or if they know witnesses who may appear before them, they should bring that fact to the attention of the foreman. They are further told that if they feel that their personal knowledge, either of the individual or of the witnesses, might in any wise influence their judgment in the decision they are required to make, they should consider the advisability of voluntarily absenting themselves from consideration of the particular

case in which their own personal knowledge may play a part. From time to time individual jurors do indicate acquaintanceship either with a prospective defendant or with a witness and that for this reason they would prefer not to serve in considering a particular matter. Apparently in all such cases the juror is invariably excused from all further connection with the particular matter.

2. As regards the question whether any procedure exists for a prospective defendant to challenge the qualifications of a grand jury panel or of an individual grand juror prior to indictment, we refer this Court to Rule 6 (b) of the Federal Rules of Criminal Procedure. This rule provides.

> (b) *Objections to Grand Jury and to Grand Jurors.*
>
> (1) *Challenges.*—The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.
>
> (2) *Motion to Dismiss.*—A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An

> indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 6 (b) (1) specifically permits either the government or "a defendant who has been held to answer in the district court" to challenge either the array or an individual juror. Cf. *United States* v. *Gale*, 109 U. S. 65, 69–70; *Clawson* v. *United States*, 114 U. S. 477; *Agnew* v. *United States*, 165 U. S. 36, 44.

No specific provision has apparently been made for a challenge by an individual who has not been "held to answer in the district court" (see Rule 5 (c), Federal Rules of Criminal Procedure), but is merely being investigated by the grand jury for possible indictment. Such an individual would, of course, be free to notify the district judge, before whom the grand jury was being or had been impaneled, as to any information bearing upon the qualifications of either the panel or an individual juror. This could be done informally, or by a suggestion *amicus curiae*, or by a formal motion. It would then be up to the court as a discretionary matter whether the information warranted an immediate investigation. Assuming that no such investigation was

deemed necessary and that an indictment was subsequently returned against the complainant, he would then have the right to file a motion to dismiss the indictment on the grounds set forth under Rule 6 (b) (2).

As was brought out in oral argument, the question whether and under what circumstances an indicted defendant is entitled to a hearing when he makes general charges of bias against grand jurors based solely upon the impact of the government's loyalty program on government employee jurors, has not been determined by this Court. The question was before this Court in *Quinn* v. *United States*, 349 U. S. 155, but was not reached. Divergent views upon this question have been expressed by the members of the Court of Appeals for the District of Columbia. See *Emspak* v. *United States*, 203 F. 2d 54, 56, 58–60, 60, 61, reversed on other grounds, 349 U. S. 190; *Quinn* v. *United States*, 203 F. 2d 20, 25, 26–32, reversed on other grounds, 349 U. S. 155.

Respectfully submitted.

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JANUARY 1956.

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